[illegible] Reversed [illegible]
on whole case

Reversed
Strong
[illegible]

Jno. D. [illegible]

15 S 39

[illegible]

18

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~402.~~ 16

MORITZ DEITSCH, PLAINTIFF IN ERROR,

VS.

HENRY B. WIGGINS, DANIEL HART, AND HENRY HART,
PARTNERS AS HART, WIGGINS & CO.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED NOVEMBER 24, 1871.

Dec. 9, 1872

SUPREME COURT OF THE UNITED STATES.

No. 402.

MORITZ DEITSCH, PLAINTIFF IN ERROR,

VS.

HENRY B. WIGGINS, DANIEL HART, AND HENRY HART, PARTNERS AS HART, WIGGINS & CO.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

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1 TERRITORY OF COLORADO,
County of Arapahoe.

In supreme court of Colorado Territory of the July term, A. D. 1869.

At a stated term of the supreme court of Colorado Territory, begun and held at the city of Denver, in said Territory, on the first Tuesday of July, A. D. 1869, it being the sixth day of said month and the first day of the regular term thereof, pursuant to law—

Present, Hon. Moses Hallett, chief justice, Hon. William R. Gorsline, and Hon. Christian S. Eyster, associate justices, H. C. Thatcher, U. S. district attorney, H. B. Haskall, deputy U. S. marshal, and Monroe L. Horr, clerk of said court—

Among other, the following proceedings were had, to wit:

District court of Gilpin County.

MORITZ DEITSCH, APPELLANT,
vs.
2 HENRY B. WIGGINS, DAVID HART, AND Henry Hart, partners under name and style of Hart, Wiggins, and Co., appellees.

Be it remembered that, heretofore, to wit, on the eighth day of July, in the year eighteen hundred and sixty-nine, a transcript of the record and proceedings had in said district court, in said cause, was filed in the office of the clerk of the supreme court of Colorado Territory, which said transcript of record and proceedings *are* in the words and figures following, to wit:

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N. B.—Paging in red ink, lower left-hand corner.

Pleas in the district court of the 2d judicial district of Colorado Territory within and for the county of Gilpin, at the July term, A. D. 1867, and at the May term thereof, A. D. 1868, before the Hon. Moses Hallett, chief justice of said Territory and judge presiding

4 at said terms of said court. Present, Hon. Mosses Hallett, C. J. & judge presiding; W'm Z. Cozens, sheriff; Horace, H. Atkins, clerk.

Henry B. Wiggins, David Hart, Henry Hart, partners under name & style of Hart, Wiggins & Co.,
v.
William Z. Cozens, Moritz Deitsch, Isador Deitsch, & Jonas Deitsch.
} Trespass.

Be it remembered that, heretofore, to wit, on the 31st day of May, A. D. 1867, the said plaintiffs, by their attorneys, caused to be issued from the office of the clerk of said court two certain writs of summons, which said writs are in words and figures following, to wit:

Territory of Colorado,
Gilpin County, ss:

The people of the Territory of Colorado to the coroner of said county, greeting:

5 We command you that you summon William Z. Cozens, impleaded with Moritz Deitsch, Isador Deitsch, & Jonas Deitsch, if he shall be found in your conuty, personally to be and appear before the district court of the second judicial district in and for Gilpin County, on the first day of the next term thereof, to be holden at the courthouse in Central City, in said Gilpin County, on the second Tuesday of July, A. D. 1867, to answer unto Henry B. Wiggins, David Hart, & Henry Hart, partners under name & style of Hart, Wiggins & Co., in a plea of trespass to the damage of said plaintiffs, a' they say, in the sum of five thousand dollars; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Horace H. Atkins, clerk of our said court, and the seal thereof at Central City aforesaid, this 31st day of May, A. D. 1867.

HORACE H. ATKINS, *Clerk.*

(Endorsed:)

Territory of Colorado,
Gilpin County, ss:

6 I have duly served the within by reading the same to the within-named W'm Z. Cozens, a' I am therein commanded.

June 1st, 1867.
Filed June 1st, 1867.

L. L. BADELL, *Coroner.*

Territory of Colorado,
Gilpin County, ss:

The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you that you summon Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, impleaded with William Z. Cozens, if they shall be found in your county, personally to be and appear before the district court of the 2nd judicial district in and for Gilpin County, on the first day of the next term thereof, to be holden at the court-house in Central City, in said Gilpin County, on the second Tuesday of July, A. D. 1867, to answer unto Henry B. Wiggins, Henry Hart, & David Hart, partners under name & style of Hart, Wiggins & Company, in a plea of trespass to the damage of said plaintiffs, as they say, in the sum 7 of five thousand dollars; and have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, Horace H. Atkins, clerk of our said court, and the seal thereof, at Central City aforesaid, this 31st day of May, A. D. 1867.

[L. S.] HORACE H. ATKINS, *Clerk.*

(Endorsed:)

TERRITORY OF COLORADO, *Arapahoe County, ss:*

I have duly served the within by reading the same to the within-named Moritz Deitsch, Isador Deitsch—Jonas Deitsch not found in my county—June 1st, 1867, as I am therein commanded.

RICHARD SOPRIS,
Sheriff of Arapahoe County.

Filed in district court this 3d day of June, 1867.

H. H. ATKINS, *Clerk.*

Afterwards, and upon the 29th day of June, A. D. 1867, the said plaintiff, by their attorneys, caused to be filed in the clerk's office aforesaid, their declaration in said cause in words and figures following, to wit:

COLORADO TERRITORY,
8 *County of Gilpin, Second Judicial District:*
Of the July term, A. D. 1867, of the district court in and for the county, district, & Territory aforesaid.

HENRY B. WIGGIN, DAVID HART, AND HENRY Hart, partners under name and style of Hart, Wiggin & Company,
v.
WILLIAM Z. COZENS, MORITZ DEITSCH, ISADOR Deitsch, & Jonas Deitsch.
} Trespass. Damages, $5,000.00.

Henry B. Wiggins, David Hart, & Henry Hart, partners under name and style of Hart, Wiggins & Company, by H. M. Teller & C. C. Post, their attorneys, complains of William Z. Cozens, Moritz Deitsch, Isador Deitsch, & Jonas Deitsch, the defendants, in a plea of trespass; for that the said defendants, on the 4th day of May, A. D. 1867, at the city of Central, in the county of Gilpin, aforesaid, with force and arms, entered a certain store-room and house of the plaintiffs, situate and being 9 in the said city of Central, county of Gilpin aforesaid, and with force and arms seized, took, and carried away the goods and chattels, to wit: fifty overcoats, one hundred undercoats, sixty pairs of pantaloons & trousers, sixty vests, ten jackets, ten fur collars, one hundred hats, and one hundred caps, the property of the said plaintiffs, then and there being found, and being of great value, to wit, of the value of two thousand three hundred & five dollars and ninety cents, and then and there converted and disposed of the same, to their own use; and other wrongs to the said plaintiffs then and there did to the great damage of the said plaintiffs, and against the peace and dignity of the people of the Territory of Colorado; wherefore the said plaintiffs say that they are injured, and have sustained damage to the amount of five thousand dollars, and therefore they bring suit, &c.

JOHNSON & TELLER, &
POST & MORGAN,
Atty's for Pl'ffs.

10 Afterwards, and upon the 11th day of July, A. D. 1867, the same being one of the regular days of said July term, A. D. 1867, of said district court, the following proceedings were had in said cause, to wit:

HENRY B. WIGGINS ET AL.
v. } 1493. Trespass.
WILLIAM Z. COZENS ET AL.

Now, on this day come the said plaintiffs, by Johnson & Teller, & Post & Morgan, their attorneys, & the said defendant William Z. Cozens, by Royle & Butler, also comes, &, on motion of plaintiffs, it is ordered by the court that said Cozens plead in this cause by the 18th instant.

Afterwards, and upon the 18th day of July, A. D. 1867, the same being one of the regular day' of said July term, A. D. 1867, of said court, the following proceedings were had, to wit:

HENRY B. WIGGINS ET AL.
v. } 1493. Trespass.
11 WILLIAM Z. COZENS ET AL.

On this day come the said plaintiffs, by Johnson & Teller & Post & Morgan, their attorneys, and the said defendants William Z. Cozens, Moritz Deitsch, & Isador Deitsch, by Royle & Butler, their attorneys, also come, and, on motion of plaintiffs, it is ordered that the said Moritz Deitsch and Isador Deitsch plead in this cause by the 20th instant; and it is further considered that the time for said defendant Cozens to plead in this cause be extended to the 19th instant.

Afterwards, and upon the 23d day of July, A. D., 1867, the same being one of the regular days of said July term of said court, the said defendants, by their attorneys, filed their pleas in said cause in words and figures following, to wit:

TERRITORY OF COLORADO, *County of Gilpin, ss:*
In the district court of Gilpin County, aforesaid, of the July term, 1867

12 HENRY B. WIGGIN, HENRY HART, & David Hart, partners under name and style of Hart, Wiggin & Co.,
v.
MORITZ DEITSCH, ISADOR DEITSCH, WILLIAM Z. Cozens, impleaded with Jonas Deitsch.

And the said defendants, Moritz Deitsch, Isador Deitsch, and William Z. Cozens, by Royle & Butler, their attorneys, come and defend the wrong and injury, when, &c., and say that they are not guilty in manner and form as the said plaintiffs have complained against them, and of this they put themselves upon the country, &c.

ROYLE & BUTLER,
Def'ts Att'ys.

And the plff's doth the like.

JOHNSON & TELLER &
POST & MORGAN, *Pl'ffs Att'ys.*

And the said defendants, for a further plea in this behalf, according to the form of the statute in such case made and provided, say actio
non; because they say that the goods and chattels in the said
13 plaintiffs' declaration mentioned, at the time mentioned in the
said declaration, to wit, the 4th day of May, A. D. 1867, were the goods and chattels of the firm of O. S. Buell & Co., a firm composed of Oliver S. Buell and other persons to these defendants unknown.

And the said defendants aver that, heretofore, to wit, on the 3d day of May, A. D. 1867, a writ of attachment was issued out of the said district court of Gilpin County aforesaid, at the suit of Moritz Deitsch, in favor of the said Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, partners doing business under the name and style Deitsch & Bro., directed to the sheriff of said Gilpin County; which said writ commanded the said sheriff to attach so much of the estate, real and personal, of the said Oliver S. Buell & Co. to be found in his county, to wit, the said county of Gilpin, as should be of value sufficient to satisfy
the sum of fourteen hundred and seventy-eight dollars and ninety
14 cents, and costs; and such estate so attached in his hands to
secure, so as to provide that the same might be liable to furthur proceeding according to law, at a court to be holden at the city of Central, for the said county of Gilpin, upon the second Tuesday of July, 1867, so as to compel the said Oliver S. Buell & Co. to appear and answer the complaint of the said Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, which said writ of attachment was duly signed and attested by the clerk of said court, and sealed with the seal of said court, and stamped and canceled in accordance with the revenue law of the United States.

And the said defendants furthur aver that at the time the said writ of attachment was issued as aforesaid, to wit, on the 3d day of May, A. D. 1867, William Z. Cozens, one of these defendants, was sheriff of said county of Gilpin, duly elected and qualified, and acting as such,
and was required and authorized to execute all writs and
15 process issued out of and by the said district court of said Gilpin
County, directed to the sheriff of said county, and that, on the said last-named day, the said writ of attachment was duly delivered to him, and that, on the said fourth day of May, A. D. 1867, he executed the said writ by levying upon and taking possession of the goods and chattels in the said declaration mentioned, as the property of the said Oliver S. Buell & Co., under and by virtue of said writ of attachment—which are the said several supposed trespasses in the said plaintiffs' declaration mentioned—as the said Cozens might lawfully do; and this the said defendants are ready to verify. Wherefore they pray judgment, &c.

ROYLE & BUTLER,
Deft's Att'ys.

Afterwards, to wit, on the 10th day of October, A. D. 1867, the said plaintiffs, by their attorneys, caused to be filed in said cause their replication, in words and figures following, to wit:

16 COLORADO TERRITORY,
County of Gilpin, 2d Judicial District:
Of the October term, 1867, of the Gilpin County, , district and
Territory aforesaid.

HART, WIGGINS & COMPANY
vs. } Trespass.
MORITZ DEITSCH ET AL.

And the said plaintiffs, by Johnson & Teller & Post & Morgan, their

att'ys, as to the plea of the said defendants by them secondly above pleaded in bar, say that they ought not to be barred of their action aforesaid, because they say that the said Oliver S. Buell, mentioned & named in said plea, was not, on the 6th day of May, 1867, or at any other time, the owner of any or any part of the goods and chattels in the said plaintiffs' declaration mentioned; but, on the contrary, these defendants say and aver that, on the said 6th day of May, 1867, and for a long time previous thereto, viz, for *for* the space of three months, were the owners of and were in the sol*l* and exclusive possession
17 of all of said goods & chattels. And this they pray may be inquired of by the country.

JOHNSON & TELLER &
POST & MORGAN,
Att'y for Pl'ff'

Afterwards, to wit, on the 21st day of May, A. D. 1868, the same being one of the regular days of the said May term, 1868, of said court, the following proceedings were had, to wit:

HENRY B. WIGGINS ET AL.
vs. } Trespass.
WILLIAM Z. COZENS ET AL.

This day this cause come on to be heard, upon the defendants' motion to suppress the depositions of John Q. Hart, filed herein, & the same being argued by counsel, & the court fully advised in the matter, it is considered that said motion be overruled.

This correction made by agreement.
H. M. TELLER.
ROYLE & BUTLER.

And, on this 4th day of June, it being one of the regular days of said court, the plff's, by their att'ys, asked leave of the court to file several replications, which leave was granted by the court.

Afterwards, and upon the 4th day of June, the same being
18 one of the regular days of said May term of said court, the said plaintiff', by their attorneys, filed in said cause this certain replication, in words & figures following, to wit:

TERRITORY OF COLORADO, *Gilpin County, ss:*

District court for Gilpin County, Colorado Territory, May term, 1868.

HENRY B. WIGGINS, HENRY HART, DAVID Hart, partners under the name and style of Hart, Wiggins & Co.,
v.
MORITZ DEITSCH, ISADOR DEITSCH, AND William Z. Cozens, impleaded, with Jonas Deitsch.

And the said plaintiff, by Johnson & Teller, Post & Morgan, their atty's, as to the plea of the said defendants by them secondly pleaded, say that the said plaintiffs ought not to be barred of their said action against the said defendants, because they say that the said goods and chattels mentioned and described in plaintiff's declaration *a*re not the goods and chattels of the said Oliver S. Buell on the 4th day of
19 May, 1867, as the defendants have alle*d*ged in their said pleas, but were the goods & chattels of the said plaintiffs on the 4th

day of May, 1867, aforesaid, at the county of Gilpin aforesaid. And this they pray may be enquired of by the country.

JOHNSON & TELLER,
POST & MORGAN,
Att'ys for Pl'ffs.

And for a furth*ur* replication to the said pleas of the said defendants thirdly pleaded, the said plaintiffs say that they ought not to be barred from having and maintaining their action against the said defendants, for they say that they deny that any writ of attachment was issued out of the district court of Gilpin County on the 3d day of May, 1867, at the suit of Moritz Deitsch, Isador Deitsch, William Z. Cozens, impleaded with Jonas Deitsch, in favor of the said last-named persons, directed to the sheriff of Gilpin County, returnable the 2d Tuesday of July, 1867,
20 as the defendants have alle*d*ged in said plea. And the said plaintiffs do furth*ur* deny that the said William Z. Cozens did, on the 4th day of May, 1867, levy on the goods and chattels described in pl'ffs' declaration, by authority of said writ of attachment, as the said defendants have alle*d*ged in their said plea. And this the said plaintiffs pray may be enquired of by the country.

JOHNSON & TELLER,
POST & MORGAN,
Att'ys for Pl'ffs.

And the defendants doth the like.

ROYLE & BUTLER.

Afterwards, to wit, on the 6th day of June, A. D. 1868, the same being one of the regular days of said May term of said court, the following proceedings were had in said cause, to wit:

HENRY B. WIGGINS, DAVID HART, HENRY Hart,
v.
WILLIAM Z. COZENS, MORITZ DEITSCH, ISAdor Deitsch, Jonas Deitsch.
} 1493.

21 Now, on this day, come the said plaintiffs, by Post & Morgan & Johnson & Teller, their attorneys, and the said defendants, by Royle & Butler, their attorneys, also come, and this cause is brought on for trial; thereupon come a jury of good and lawful men, to wit, John Bartholomew, Jeremiah Hogan, Calvin C. Patterson, Alexander R. Wiley, John Bennett, Dewitt Turch, Hiram Thompson, Charles Weatherhogg, William Byrant, Joseph Thomas, Robert W. Scott, Lucien Smith, who are duly empanneled & sworn to well and truly try the issue joined between the said plaintiffs and the said defendants, and a true verdict render according to the evidence. After hearing the evidence, the arguments of counsel, & the instructions of the court, retire to their room to deliberate, in charge of a sworn bailiff. Afterwards, and upon the same day, the said jury return into court their verdict, as follows,
22 to wit: We, the jury, find the defendants William Z. Cozens and Moritz Deitsch guilty, and assess the plaintiffs' damages at twenty-three hundred & fifteen dollars & nin'ty cents. Thereupon, the said defendants give notice that they will move the court for a new trial of this cause.

Afterwards, and upon the 20th day of June, A. D. 1868, the same being one of the regular days of said May term of said court, the following proceedings were had, to wit:

HENRY B. WIGGINS ET AL.
vs.
WILLIAM Z. COZENS, MORITZ DEITSCH, ISAdor Deitsch, impleaded with Jonas Deitsch. } 1493. Trespass.

Now, on this day, this cause come on to be heard upon the motion of the said defendants William Z. Cozens and Moritz Deitsch, to set aside the verdict heretofore rendered herein and for a new trial
23 of this cause, and, the arguments of counsel having been heard
thereon, and the court being fully advised in the premises, is of the opinion that said motion be overruled.

Therefore, it is considered by the court that the said plaintiffs do have and recover of and from the said defendants William Z. Cozens and Moritz Deitsch, the sum of twenty-three hundred and fifteen dollars and ninty cents for their demages and also their costs of suit in this behalf expended, hereby taxed at seventy-seven dollars and five cents, and that execution issue therefore.

It is furthur considered by the court that the said plaintiffs take nothing of the said defendant, Isador Deitsch, by reason of their aforesaid action, and that the said Isador Deitsch go hence without day and recover of and from the said plaintiffs his costs in this behalf expended.

And now comes the said defendants William Z. Cozens and
24 Moritz Deitsch, and each for himself prays an appeal of this
cause to the supreme court of this Territory, according to law. Therefore, it is considered by the court that an appeal of this cause be granted as aforesaid, and that the said Cozens and Moritz Deitsch do each give his appeal bond in the sum of four thousand dollars, with suritey, to be approved by the clerk of this court, and conditioned according to law, and that the said bonds and bills of exceptions be filed within thirty days from this date.

Afterwards, to wit, upon the 20th day of July, A. D. 1868, the said defendants Moritz Deitsch, by his attorney, caused to be filed in the said clerk's office his bond in appeal in words and figures following, to wit:

Know all men by these presents that we, Moritz Deitsch, Abra-
25 ham Jacobs, H. Z. Salomon, & Jonas Deitsch, of the county of
Arapahoe, in the Territory of Colorado, are held and firmly bound unto Henry Hart, Henry B. Wiggins, and David Hart, in the penal sum of four thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, several'y, and firmly by these presents.

Witness our hands and seals this 17th day of July, A. D. 1868.

The conditions of the above obligation is such that, whereas the said Henry Hart, Henry B. Wiggins, and David Hart, plaintiffs, did, on the seventee'th day of June, A. D. 1868, in the district court of the second judicial district of Colorado Territory, within and for the county of
Gilpin, at the May term thereof, A. D. 1868, recover a judgment
26 against the above-bounden Moritz Deitsch and one William Z.
Cozens, defendants, in an action of trespass, for the sum of two thousand three hundred & fifteen dollars and ninety cents, and costs of suit, from which judgment the said Moritz Deitsch has taken an appeal to the supreme court of Colorado Territory:

Now, if the above-bounded Moritz Deitsch shall duly prosecute his appeal, and shall pay said judgment, costs, interests, and damages, in case the said judgment shall be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

MORITZ DEITSCH, [SEAL.]
Per JONAS DEITSCH,
His Att'y-in-fact.
A. JACOBS. [SEAL.]
H. Z. SOLOMON. [SEAL.]
JONAS DEITSCH. [SEAL.]

Approved & filed the 20th day of July, A. D. 1868.

27 And, at the same time, to wit, the day and year last aforesaid, the said defendants Moritz Deitsch and Cozens, by their attorneys, caused to be filed in said clerk's office their bill of exceptions in said cause in words and figures following, to wit:

Bill of exceptions.

TERRITORY OF COLORADO, *County of Gilpin, ss:*

In district court of Gilpin County aforesaid, of May term, A. D. 1868.

HENRY B. WIGGINS, DAVID HART, & HENRY Hart, partners, under the name & style of Hart, Wiggins & Co.,
v.
WILLIAM Z. COZENS, MORITZ DEITSCH, & ISADOR Deitsch, impleaded with Jonas Deitsch.

28 Be it remembered that, on the sixth day of June, A. D. 1868, the same being one of the days of the May term, A. D. 1868, of said court, this cause came on to be tried, a jury having *having* been duly empannel'd and sworn to try the issues herein, & the plaintiffs, to ma'ntain the issues on their part, introduced PHILLIP M. MARTIN as a witness, who, being duly sworn, testified as follows, to wit:

Reside at Central City, and was the county clerk and recorder of Gilpin County in the year 1867. Was a member of the firm of Martin Bro's & Co., then selling goods in Central City. I have been in the business of selling goods for the last twenty-one years. I know that there is such a firm as Hart, Wiggins & Co. I know John Q. Hart, and know defendants. John Q. Hart, agent for plaintiffs, came here in the spring of 1867, and opened a store on Main street, & commenced selling goods—hats, caps, clothing, &c.—under the name of Hart, Wiggins & Co. I was about there at that time, & saw Mr. Hart there. I 29 know of Cozens going there and getting some goods, some time in May, 1867. I know when this suit was brought. He took them before the bringing of the suit. He took the goods mentioned in the memorandum which I hold in my hand. I had a list of the property and helped invoice them. North, Eubank & myself made lists from the original list. The list I now hold in my hand is a correct copy of the original. The goods were boxed up in the store, and the sheriff took them away, and stored them, I think, with A. Jacobs & Co. One of the Deitsches was there a day or so before—it was Moritz Deitsch, I think. Cozens looked over the original penciled list, & said it was all thought they would bring that price if judiciously managed. The witness then stated voluntarily: When I said the goods had brought 38 some more, and some less, than the invoice price, I meant that goods of the stock from which these were taken had brought such price. In reply to a question by plaintiff's counsel, the witness stated there were three lists made out of the goods which were taken; Mr. Cozens had one, and he examined this list which I have, and said it was correct. The goods, at the time they were bought of Buell, were in the store now occupied by Clark & Street as a tobacco store, next door to store formerly occupied by J. H. Hense.

Re-cross-examination:

I think they commenced moving the goods as soon as we got through invoicing. It was next day, I think. The defendants, by their counsel, then asked said witness the following question: Did that sale include all of the goods then in Buell's store? To which question said 39 plaintiff', by their counsel, objected, and the court sustained said objection, and refused to allow said witness to answer said question; to which ruling of the court in sustaining said objection, and refusing to allow said witness to answer said question, the defendants, by their counsel, then and there excepted. The said plaintiffs then offered in evidence the scheduel or invoice list which witness held in his hand, of which he had spoken in his evidence. To the offering of which and the reading of the same in evidence the defendants, by their counsel, objected; but the court overruled said objection, and allowed the same to be read to the jury; to which ruling of the court in overruling said objection and in permitting said schedule or invoice list to be read to the jury, the said defendant', by their counsel, excepted. The said schedule or invoice list is as follows:

40 *List of goods taken May 4th*, 1867, *by Sheriff W. Z. Cozens, of Hart, Wiggins & Co., Central City, C. T.*

1000.	1	f'cy cass. coat	13	
12⅓.	1	" " "	16	
1501.	2	black sat. sacks, $7.00	14	
	6	blue jeans coats, 10.00	60	
708.	2	whit' sacks, 15	30	
1314.	1	milton cas. frock	15	
1961.	3	f'cy " f'ock, tress, 22.00	66	
1302.	2	seal E. W. coats, 15.00	30	
1247.	1	cass. E. W. do	18	
76.	1	f'cy cass. sack	22	
2870.	1	" " "	13	
1574.	2	" " " 10.00	20	
9.	2	" " " 22	44	
754.	2	" " " 12	24	
772.	2	" " " 16	32	
	1	bro. beaver E. W. coat	25	
145.	3	cass. frocks, 16	48	
2021.	1	chinchilla overcoat	50	
797.	2	cass. " sacks, 16.60	31	20
3.	1	chinchilla " coat	35	
699.	2	Canada gray " " 25	50	
25.	2	bl'k kersey " " 11	22	
1718.	2	seal-skin " " 12	24	
1716.	2	" " " 20	40	

41	1549.	1 milton " "		17	
	2074.	1 bl'k overcoat		16	
	2045.	1 chinchilla "		22	
	2006.	1 bl'k beaver "		14	
	439.	3 " " "	14.40	43	20
	1549.	1 " " "		17	
	1499.	1 seal "		16	
	2074.	1 bl'k beaver "		16	
	2271.	1 " chinchilla "		13	
	91.	1 " Esquimaux " sack		14	
	2760.	1 beaver "		11	40
	972.	1 f'cy cass. coat		13	
	1304.	1 milton "		15	
		1 f'cy sack "		5	50
	12½.	1 " cass. "		14	
	1648.	1 chinchilla "		19	
	4¾.	1 f'cy cass.		14	
	320.	1 bl'k sat. "		8	
	409.	1 bl'k cass. "		11	
	2¾.	1 " " "		15	50
	1333.	1 gray " "		15	
	1247.	1 " " "		18	
	758.	1 " "		10	50
	1302.	2 seal "	15	30	
	1456.	2 " "	15	30	
	6833.	2 cass. "	11.50	23	
	1243.	1 " E. W.	15	30	
	284.	1 silk plush vest		9	50
42	794.	2 silk plush vests	$15	30	
	368.	1 cass. vest		5	50
	2563.	1 " "		6	50
	131.	1 " "		5	
	934.	1 " "		4	
	915.	1 " "		2	50
	85.	1 " "		6	
	842.	1 " "		8	
	2438.	2 " "	5.50	11	
	1040.	2 f'cy cass. D. B. vests	7	14	
	73.	2 " " " "	6	12	
	430.	2 " " " "	5	10	
	991.	3 " " " "	6	18	
	6506.	6 " " " "	5	30	
	2872.	1 " " " "		5	50
		2 " " single "	4	8	
		3 " " r'll "	3.50	10	50
	601.	6 p'r boys' cott. pants	2	12	
	1470.	2 " " cass "	5	10	
	498.	3 " " " "	4	12	
	377.	1 " jackets	4	16	
	5144.	1 " "		8	
	2424.	1 " "		4	
	1879.	5 p'rs mens' pants	3	15	
	6.	3 " " "	8	24	
	990.	2 cass. " "	12	24	
	660.	1 " " "		14	
	1006.	1 p'r cass. pants		6	50

	1288.	1 " "		11	
43	2358.	5 p'rs cass. pants	12	60	
		4 doz. gray cloth caps	30	120	
		27 ass. hats	3	81	
		12 " stitch. hats	3	36	
		7 cass mix. "	3	21	
		6 " " "	2	12	
		3 fur caps	3	9	
		1 br'n "		4	
		3 " "	4	9	
		4 silk plush caps	3.40	13	60
		3 fur "	4	12	
		6 boys' "	1	6	
		1 cap		3	
		5 fur collars	9	45	
		7 stiff rain cloth	3	21	
	1843.	3 cass. coats	25	75	
	768.	1 " "		20	
		2 " "	20	40	
	1357.	1 " "		19	
	2271.	1 " "		13	
		1 " "		10	
	612.	1 " "		15	
		1 " "		22	
	4678.	1 chinchilla "		25	
	2872.	1 cass. "		15	
				2,315	90

44 The said plaintiffs then introduced CHARLES C. POST as a witness, who, being duly sworn, testified as follows:

I have never seen any of the plaintiffs. I know the defendants. I know of the taking of the goods on the 4th of May, 1867. Plaintiffs were doing business at that time in New York City, and in Central City, on Main street, right-hand side as you go up to the post-office. I was there when the goods were taken away. I saw W'm Z. Cozens and Moritz Deitsch. Deitsch was there when the goods were being packed. He was engaged in selecting the goods from the shelves as they were being packed.

Cross-examination:

John Q. Hart, P. W. Martin, Moritz Deitsch, Orlando North, myself & Cozens were there at the time. Other persons were coming in
45 and out all the time.

Which was all the evidence offered by the plaintiffs.

The said defendants, to maintain the issues on their part, introduced CHARLES E. SHERMAN, as a witness, who, being first duly sworn, testified as follows:

I know none of the parties personally, except Cozens & Moritz Deitsch. I know John Q. Hart & Oliver S. Buell. I was clerk for Buell in May, 1867. Buell then did business for himself in Central City, under the style of O. S. Buell & Co. The style of O. S. Buell & Co. was used because Buell, at the commencement of his business, intended to have a partner; he did not have any at that time. I have been in the employ of Buell five or six months prior to May, 1867. In

April, 1867, Buell was East; he returned here on the 2d or 6th of May, 1867. He was doing business in the building now occupied by
46 Clark & Sweet. His business was wholesail & retail. While
Buell was East my general instructions were to manage his business & do the best I could for his prosperity. When Buell went East my instructions were to continue the business until he returned. I first knew John Q. Hart in April, 1867—about middle of April, I think.

The said defendants then offered to prove the following facts by said witness, as follows:

The defendants offer to prove that the goods taken by the defendant was a part of the stock of merchandise of Oliver S. Buell, who did business under the name and style of O. S. Buell & Co.; that the witness, Charles E. Sherman, was the clerk of said O. S. Buell for the space of about six months prior to the fourth day of May, 1867; that, for two or three months prior to the second or 6th day of May, A. D. 1867,
47 the said O. S. Buell was absent from the said Territory of Colo-
rado; that, during the absence of said Buell, said Sherman was the clerk of said Buell, to carry on the regular business of said Buell in Central City, Gilpin County, Colorado Territory, which was retailing clothing and merchandise; that the said Sherman had no right or authority whatever to sell or dispose of the entire stock of goods of said Buell, but was only authorized to sell in the regular course of business; that, on the 29th day of April, 1867, John Q. Hart, agent of the plaintiff, well knowing that the said Sherman was not authorized to sell the entire stock of goods, fraudulently agreed, combined, and confederated with the said Sherman to make a pretended purchase of the entire stock of goods for the purpose of hindering, delaying, and defrauding the
48 defendant' Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, de-
fendants herein, and other creditors; that the said Hart well knew that the said Jonas Deitsch, Moritz Deitsch, and Isador Deitsch, defendants, were creditors of said Buell to a large amount, and that such sale was designed by him to cheat, hinder, and defraud said defendants; that said stock of goods was well worth the sum of ten thousand dollars, but was sold to said Hart, Wiggin & Co., for a grossly inadequate sum; that, whatever money was paid, if any, or securities given, if any, were so canceled, smuggled, and arranged to protect and place it beyond the reach of defendants, and for the benefit of the said Buell, Hart, Wiggin & Co., & John Q. Hart, & said Sherman. To which evidence offered by the said defendants the said plaintiffs objected, and the court sustained said objection, and refused to allow said
49 evidence to be introduced; to which ruling and decission of the
court in sustaining said objection, and refusing to allow said evidence to be introduced, said defendants, by their counsel, then and there excepted.

The said defendants then offered in evidence a certain affidavit, bond, and writ of attachment, & the sheriff's return endorsed on said writ in a certain cause then pending in the district court of Gilpin County aforesaid, wherein Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, partners under name and style of Deitsch & Bro', were plaintiffs, and Oliver S. Buell was defendant, the said plaintiffs, by their attorney, in open court, having admitted that they were the affidavit, bond, and writ of attachment in said suit, and that such suit was pending in said court.

To the introduction of each and all of which said evidence said
50 plaintiffs objected, and said court sustained said objection, and
refused to allow the same to be received in evidence; to which

TERRITORY OF COLORADO,
County of Gilpin, ss :

I have duly levied the within following described personal property:

Invoice of goods taken from Hart, Wiggin & Co., Central City, May 4th, 1867.

58

Number.	Peices.	Goods.	Number.	Peices.	Goods.
1000	1	F'cy cass. coat.	2006	1	Black beav. coat.
12½	1	" " "	439	1	" " "
1501	2	Bl'k U. sack.	1549	1	" " "
	6	Blue jeans coats.	1499	1	Seal "
708	2	White sacks.	2074	1	Black beaver "
1314	1	Coat.	2271	1	" chin. "
1961	3	F'cy cass. coats.	91	1	" Esquimaux "
1302	2	Seal E. W. "	2760	1	Beav. coat.
1247	1	Cass. E.W. "	9½	1	F'cy M. b'r coat.
76	1	F'cy cass. sack.	1304	1	Milton coat.
2870	1	F'cy cass. sack.		1	Fancy satin coat.
1574	2	" " "	12½	1	" cass. "
9	2	" " "	1648	1	Chin. coat.
754	2	" " "	4½	1	Cassimer' coat.
772	2	" " "	320	1	Bl'k sat. "
	1	" bro. coat.	409	1	Cassimer'.
145	3	Cassimer' frocks.	2½	1	" "
2021	1	Over coat.	1333	1	Gray coat.
797	2	Cassimer' over coat'.	1247	1	" "
3	1	Chinchilla " "	758	1	" "
699	2	Gray C. coat'.	302	2	" mil. "
25	2	Black O. "	1456	2	" seal "
1718	2	Seal coats.	6833	2	Cass. coats.
1716	2	" "	1243	1	" "
1549	1	Milton coat.	1594	2	Cass. E. W. "
2074	1	Black O. coat.	284	1	Silk P. vest.
2445	1	Chin. coat.	794	2	" "
			368	1	C'ssimere "
59	4	D. gray cloth caps.	2563	1	" "
	27	A. S. T. hats.	131	1	" "
	2	" " "	934	1	" "
	7	Cass. mixed hats.	915	1	" "
	6	" hats.	85	1	" "
	3	Cass. fur caps.	842	1	" "
	1	Bea. caps.	.2438	2	" "
	3	Beaver caps.	1040	2	F'cy cassimere D. B. vest.
	4	Silk plush do.	73	2	" " " "
	3	Fur caps.	430	2	" " vest.
	6	Bay caps.	991	3	" " "
	1	Cap.	6506	6	" " "
	5	Fur collars.	2872	2	" " "
	7	Stiff rain cloth.		1	Fancy cassimere single.
1843	3	Cass. coats.		3	" " R. E.
768	1	" "	601	6	P'rs boys' coats & pants.
	2	Cass. coats.	1407	2	" " cass. "
359	1	" "	498	3	P'rs boy' cass. pants.
2271	1	" "	377	1	" " " "
	1	" "	3265	4	" boys' jackets.
612	1	" "	5144	1	" " "
	1	" "	2424	1	" " "
4678	1	Chin. "	1879	5	P'rs men's pants.
2872	1	Cass. "	6	3	" " "
			990	2	" " cass. "
			666	1	" " cass. pants.
			1006	1	" " "
			1288	1	" " "
			2258	5	" " "

60 All the above personal property, lying and being in Central City, Gilpin County, Colorado Terr., and taken as the property of Hart, Wiggin & Co.

Central City, May 4th, 1867.

W'M Z. COZENS,
Sheriff of Gilpin County, Col. Terr.

TERRITORY OF COLORADO,
County of Gilpin, ss:

I have duly served the within by reading the same to Oliver S. Buell, this sixth day of May, A D. 1867.

W'M Z. COZENS,
Sheriff Gilpin County.

(Endorsed:) Filed July 10, 1867. H. H. Atkins, clerk.

Which was all the evidence offered by the defendants in said cause. Whereupon the said plaintiff moved and requested the court to give the following instructions to the jury; and thereupon the said court did give the following instructions to the jury:

61 The court is asked to instruct the jury that the defendants are not entitled to have the goods and chattles taken by them appraised or valued at the wholesa*il* price; but the jury may find the goods and chattels of the value they would bring in the market at retail.

If the jury believe, from the evidence in this case, that, before the commencement of this suit, the plaintiffs were possessed of quantity of personal property, and the defendants W. Z. Cozens and Moritz Deitsch took the said goods and chattels, and carried the same away without the consent of the plaintiffs, such acts were acts of trespass.

The court instructs the jury that where the goods of another are taken without his consent and against his will, and it is shown that the
taking was wrongfully, the highest market price or value of the
62 goods so taken at the time of the taking will be allowed the
owner.

If the jury believe from the evidence that, at the time defendant Cozen was packing up the goods and chattels mentioned in the declaration, Moritz Deitsch was then assisting in selecting the same without consent of plaintiffs, then he was guilty of trespass, and if he had the consent of the said plaintiffs, it is incumbent on the defendant Deitsch to prove such consent.

The court instructs the jury that, if they believe, from the evidence, that the goods mentioned in the declaration were in the possession of the plaintiffs at the time of the taking of the goods by the defendants, or either of them, if said goods were taken by them, or either of them, the law presumes they, the said plaintiffs were the owners of said goods;
and it is incumbent on the defendants to rebut that presumption
63 by proof that they were not the goods of said plaintiffs; and if
said defendants have failed to make such proof, they should find for the plaintiffs such sum as by the evidence such goods are shown to have been worth.

To which ruling and decision of the court in giving said instructions, said defendants, by their counsel, then and there excepted.

Whereupon the said defendants moved the court to give the jury the following instructions, to wit: To enable the plaintiffs to recover against the defendants in this action, the plaintiffs must show by evidence to the jury, that the said plaintiffs, at the time of the taking, were rightfully in possession, or entitled to the possession of the property alle*d*ged to have been taken as against the defendants; which instruction was given by the court.

And the defendants moved the court to instruct the jury furth*ur* as follows, to wit:

64 Unless the jury believe, from the evidence, that defendant

Moritz Deitsch was present in some way, aiding, counselling, and ab*b*etting the taking of the goods in question, they will find defendant Moritz Deitsch not guilty.

The jury are instructed by the court that, to enable plaintiffs to recover in this action, plaintiffs must, at the time of such taking, have had rightful possession of the premises in question.

If the jury believe, from the evidence, that Moritz Deitsch was present at the alle*d*ged time of the taking of the goods in question, but that he neither coun*c*eled nor took any part in said taking, they will find defendant Moritz Deitsch not guilty.

To the giving of which instructions the said plaintiffs objected, and
the court sustained said objection, and refused to give said in-
65 structions to the jury; to which ruling and decission of the court,
in sustaining said objection, and in refusing to give said instructions to the jury, the said defendants then and there excepted. And thereupon the jury gave their verdict against the defendants Cozens and Moritz Deitsch.

And afterwards and during said May term of court of said county the said defendants Cozens and Moritz Deitsch filed and made a motion for a new trial of said cause; which said motion was in the following words and figures, to wit:

TERRITOBY OF COLORADO,
County of Gilpin, *ss*:

In the district court of Gilpin County aforesaid, May term, A. D. 1868.

HENRY HART, HENRY B. WIGGIN, AND DAVID Hart partners under the firm-name and style of Hart, Wiggin & Co.
vs.
MORITZ DEITSCH, ISADOR H. DEITSCH,
66 and William Z. Cozens impleaded with Jonas Deitch.

And now come the said defendants Moritz Deitsch and William Z. Cozens, by Royle & Butler, their attorneys, and move the court to set aside the verdict, and to grant a new trial of this cause, for the following reasons, to wit:

First. Because the court erred in admitting improper testimony offered by the plaintiffs.

Second. Because the court erred in excluding proper & relevant testimony offered by defendants.

Third. Because the court erred in excluding the affidavit, bond, and writ of attachment offered in evidence by the defendants.

Fourth. Because the court erred in giving the instructions asked for by the plaintiffs.

Fifth. Because the court erred in refusing the instructions asked for by the defendants.

Sixth. Because the verdict is contrary to the law.
67 Seventh. Because the verdict is contrary to the evidence.
Eighth. Because there is no proper or sufficient verdict.

Ninth. Because the proceedings are otherwise irregular, informal, & insufficient

ROYLE & BUTLER,
Def'ts Att'ys.

But the court overruled the said motion and gave judgment upon the said verdict of the said jury against the said defendants Moritz Deitsch and William Z. Cozens; to which the said defendants Moritz Deitsch and Cozens then and there excepted. And, inasmuch as the matters aforesaid do not appear of record, the counsel for the said defendants Moritz Deitsch and Cozens present this bill of exceptions, and pray that the same may be signed and sealed by the court and made part of the record in said cause; and it is done accordingly.

MOSES HALLETT, *Judge.* [SEAL.]

68 TERRITORY OF COLORADO,
County of Gilpin, ss:

HENRY B. WIGGIN ET AL.
vs. } Trespass.
MORITZ DEITSCH ET AL.

I, Horace H. Atkins, clerk of the district court of Gilpin County, Colorado Territory, do hereby certify that the above & foregoing transcript is a true, perfect, and complete copy of the records of the proceedings in the above entitled cause in the said district court and also a correct copy of all the pleadings, the original writs, bond, and bill of exceptions in said above entitled cause; all of which said records & papers are now on file in my office.

Witness my hand and seal of said court this 6th day of July, A. D. 1869.

[SEAL OF DISTRICT COURT.] H. H. ATKINS, *Clerk.*

68½ (Endorsed:) Moritz Deitsch, appellant, vs. Hart, Wiggin & Co., appelle'. Filed July 8, 1869. M. L. Horr, clerk. Royle & Butler. Hughes, Charles & Elbert.

69 And afterwards, to wit, on the ninth day of July, A. D. 1869, the same being one of the days of the aforesaid term A. D. 1869, of said supreme court—present, as aforesaid—the following proceedings were had in said court in said cause and entered of record to wit:

MORITZ DEITSCH, APPELLANT,
vs.
HENRY B. WIGGINS, DAVID HART, AND HENRY Hart, partners under name and style of Hart, Wiggins, & Co., appellees. } Gilpin.

Now, on this day, comes the said parties and this cause come on to be heard and the same is submitted to the consideration and judgement of the court, and judgement thereon is reserved until another day.

70 And it is ordered by the court that the said appellant file his written argument herein within fifty days from this date, and that the said appellee file his written reply thereto within fifty days thereafter, and that the said appellant file his written rejoinder to the reply of the said appellee within fifteen days after the expiration of the last mentioned fifty days.

And afterwards, to wit, on the twenty-fourth day of February, A. D. 1871, the same being one of the days of the February term, A. D. 1871, of the supreme court of Colorado Territory, pursuant to law—present.

Hon. Moses Hallett chief justice; Hon. Christian S. Eyster, and Hon. James B. Belford, associate justices; M. A. Shaffenbury, U. S. marshal; and David W. Crater clerk of said court—the following proceedings were had in said court in said cause and entered of record to wit:

71 MORITZ DEITSCH, APPELLANT,
vs.
HENRY B. WIGGINS, DAVID HART, AND HENRY Hart, partners, as Hart Wiggins, & Co., appellees.

Appeal from Gilpin County district court.

This cause having been heretofore argued and submitted to the judgment and consideration of the court at the present term thereof and it appearing to the court that there is no error either in the record and proceedings or judgment of the district court below, it is ordered by the court that the judgment of the district court be affirmed and stand in full force and effect, and that the said appellees recover of and from the said appellant their costs and charges in this behalf expended and that execution issue therefor, and that the opinion of the court, filed herein, be recorded.

72 And afterwards, to wit, on the seventh day of March, A. D. 1871, there was filed in the office of the clerk of the supreme court of Colorado Territory, the following affidavit, power of attorney, bond, original writ of error, with copy of same. And which said affidavit is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Territory of Colorado, City of Denver, ss:

Before me the subscriber, David W. Crater, clerk of the supreme court of the Territory of Colorado, sitting at Denver, personally appeared Jonas Deitsch, of said city, who, being duly sworn, saith that he is the attorney-in-fact of the appellant in the case of Moritz Deitsch, appellant, vs. Hart, Wiggins & Co., appellees, No. July term, 1869, in
73 said court and otherwise fully acquainted with the facts and issues involved in said suit; and that the "amount in controversy" in said suit, exclusive of interest and costs, exceeds one thousand dollars; that the plaintiff in error resides in the State of New York, is there now, absent, and cannot be present to make this affidavit; that deponent knows such amount and all the matters herein stated of his own personal knowledge, and that this affidavit is made to show the appellate jurisdiction of the Supreme Court of the United States in said case under the organic act of said Territory.

JONAS DEITSCH.

Sworn & subscribed before me this 7th day of March, A. D. 1871. Witness my hand and the seal of said court.

[SEAL OF COURT.] DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

74 (Endorsed:) "Moritz Deitsch vs. Hart, Wiggins & Co. Affidavit of a competent witness to prove amount in controversy. Filed March 7, 1871. D. W. Crater, clerk."

And which said power of attorney is in the words and figures following, to wit:

Know all men by these presents that I, Moritz Deitsch, of Denver City, in the Territory of Colorado, but at present residing in New York City, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Jonas Deitsch, of Denver City, Colorado Territory, my true and lawful attorney, for me, and in my name, place, and stead, to enter into, make, sign, execute, and acknowledge 75 any and all bonds which are or may be or become necessary or expedient to be made and entered into in any and all suits or proceedings already instituted or hereafter to be instituted or brought against me, either individually, or in conjunction with other parties, and either with or without sureties or a surety; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

[U. S. internal revenue stamp, 50 c., duly canceled.]

76 In witness whereof I have hereunto set my hand and seal the eleventh day of July, in the year one thousand eight hundred and sixty-eight.

MORITZ DEITSCH. [WAFER SEAL.]

Sealed and delivered in the presence of—
NATHANIEL GILL.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that, on the 11th day of July, A. D. 1868, before me, Frederick R. Anderson, a commissioner of deeds of the Territory of Colorado in and for the State of New York, duly appointed and commissioned under and by virtue of the laws of said Territory of Colorado, duly sworn, and dwelling in said city of New York, personally appeared Moritz Deitsch, personally known to me to be the individual described in, and who executed the within instrument as 77 appointor, and acknowledged to me that he had executed the same as his act and deed, freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

{ SEAL OF OFFICE OF COMMISSIONER. }

FRED'K R. ANDERSON,
Commissioner for Colorado in New York.

(Endorsed:) "Moritz Deitsch to Jonas Deitsch, dated July 11th, 1868. Power of attorney. Filed March 7, 1871. D. W. Crater, clerk."

And which said bond is in the words and figures following, to wit:

78 Know all men by these presents that we, Moritz Deitsch, by his attorney-in-fact Jonas Deitsch, George T. Clark, Jonas Deitsch, and Hiram Z. Solomon, all of the city of Denver, Colorado Territory, are held and firmly bound unto Henry B. Wiggins, David Hart, and Henry Hart, partners as Hart, Wiggins & Co., of the city of New York,

Hon. Moses Hallett chief justice; Hon. Christian S. Eyster, and Hon. James B. Belford, associate justices; M. A. Shaffenbury, U. S. marshal; and David W. Crater clerk of said court—the following proceedings were had in said court in said cause and entered of record to wit:

71 MORITZ DEITSCH, APPELLANT,
vs.
HENRY B. WIGGINS, DAVID HART, AND HENRY Hart, partners, as Hart Wiggins, & Co., appellees.

Appeal from Gilpin County district court.

This cause having been heretofore argued and submitted to the judgment and consideration of the court at the present term thereof and it appearing to the court that there is no error either in the record and proceedings or judgment of the district court below, it is ordered by the court that the judgment of the district court be affirmed and stand in full force and effect, and that the said appellees recover of and from the said appellant their costs and charges in this behalf expended and that execution issue therefor, and that the opinion of the court, filed herein, be recorded.

72 And afterwards, to wit, on the seventh day of March, A. D. 1871, there was filed in the office of the clerk of the supreme court of Colorado Territory, the following affidavit, power of attorney, bond, original writ of error, with copy of same. And which said affidavit is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Territory of Colorado, City of Denver, ss:

Before me the subscriber, David W. Crater, clerk of the supreme court of the Territory of Colorado, sitting at Denver, personally appeared Jonas Deitsch, of said city, who, being duly sworn, saith that he is the attorney-in-fact of the appellant in the case of Moritz Deitsch, appellant, vs. Hart, Wiggins & Co., appellees, No. July term, 1869, in
73 said court and otherwise fully acquainted with the facts and issues involved in said suit; and that the "amount in controversy" in said suit, exclusive of interest and costs, exceeds one thousand dollars; that the plaintiff in error resides in the State of New York, is there now, absent, and cannot be present to make this affidavit; that deponent knows such amount and all the matters herein stated of his own personal knowledge, and that this affidavit is made to show the appellate jurisdiction of the Supreme Court of the United States in said case under the organic act of said Territory.

JONAS DEITSCH.

Sworn & subscribed before me this 7th day of March, A. D. 1871.
Witness my hand and the seal of said court.

[SEAL OF COURT.] DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

74 (Endorsed:) "Moritz Deitsch vs. Hart, Wiggins & Co. Affidavit of a competent witness to prove amount in controversy. Filed March 7, 1871. D. W. Crater, clerk."

And which said power of attorney is in the words and figures following, to wit:

Know all men by these presents that I, Moritz Deitsch, of Denver City, in the Territory of Colorado, but at present residing in New York City, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Jonas Deitsch, of Denver City, Colorado Territory, my true and lawful attorney, for me, and in my name, place, and stead, to enter into, make, sign, execute, and acknowledge 75 any and all bonds which are or may be or become necessary or expedient to be made and entered into in any and all suits or proceedings already instituted or hereafter to be instituted or brought against me, either individually, or in conjunction with other parties, and either with or without sureties or a surety; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

[U. S. internal revenue stamp, 50 c., duly canceled.]

76 In witness whereof I have hereunto set my hand and seal the eleventh day of July, in the year one thousand eight hundred and sixty-eight.

MORITZ DEITSCH. [WAFER SEAL.]

Sealed and delivered in the presence of—
NATHANIEL GILL.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that, on the 11th day of July, A. D. 1868, before me, Frederick R. Anderson, a commissioner of deeds of the Territory of Colorado in and for the State of New York, duly appointed and commissioned under and by virtue of the laws of said Territory of Colorado, duly sworn, and dwelling in said city of New York, personally appeared Moritz Deitsch, personally known to me to be the individual described in, and who executed the within instrument as 77 appointor, and acknowledged to me that he had executed the same as his act and deed, freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

{ SEAL OF OFFICE OF COMMISSIONER. }

FRED'K R. ANDERSON,
Commissioner for Colorado in New York.

(Endorsed:) "Moritz Deitsch to Jonas Deitsch, dated July 11th, 1868. Power of attorney. Filed March 7, 1871. D. W. Crater, clerk."

And which said bond is in the words and figures following, to wit:

78 Know all men by these presents that we, Moritz Deitsch, by his attorney-in-fact Jonas Deitsch, George T. Clark, Jonas Deitsch, and Hiram Z. Solomon, all of the city of Denver, Colorado Territory, are held and firmly bound unto Henry B. Wiggins, David Hart, and Henry Hart, partners as Hart, Wiggins & Co., of the city of New York,

in the sum of four thousand six hundred and thirty-one $\frac{80}{100}$ dollars to be paid to the said Hart, Wiggins & Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Witness our hands and seals the seventh day of March, in the year of our Lord one thousand eight hundred and seventy-one.

79 Whereas, lately at a session of the supreme court of the Territory of Colorado, in a suit depending in said court, on appeal from the district court of the second judicial district of said Territory, between Moritz Deitsch, appellant, and the said Hart, Wiggins & Co., appellee, final judgment was rendered against the said appellant in the sum of two thousand three hundred and fifteen $\frac{90}{100}$ dollars, with costs. And the Moritz Deitsch, appellant, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellees, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

80 Now, the condition of the above obligation is such, that if the said Moritz Deitsch shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, without any fraud or further delay, then this obligation to be void; otherwise to be and remain in full force and virtue.

MORITZ DEITSCH, [SEAL.]
By his attorney-in-fact, JONAS DEITSCH. [SEAL.]
JONAS DEITSCH. [SEAL.]
GEORGE T. CLARK. [SEAL.]
H. Z. SOLOMON. [SEAL.]

Sealed and delivered in presence of—
DAVID LINCOLN.

Taken and approved by me at Denver, in the Territory of Colorado, this 7 day of March, A. D. 1871.

MOSES HALLETT,
C. J. Sup. Court, Col. Ter'y.

80½ (Endorsed:) "Bond. Moritz Deitsch, appellant, vs. Hart, Wiggins & Co., appellees. In error to the Supreme Court of the United States. Filed March 7, 1871. D. W. Crater, clerk."

And which said original writ of error is hereto annexed, and is in words and figures following:

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honou*r*able the judges of the supreme court of the Territory of Colorado, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Colorado before you, between Moritz Deitsch, appellant, and Henry B. Wiggins, David Hart, and Henry Hart, partners as Hart, Wiggins & Co., appellees, a manifest error hath happened to the great damage of the said Moritz Deitsch, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and

full and speedy justice done to the parties aforesaid in this behalf, we do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme
82 Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honourable Salmon P. Chase, Chief Justice of the said Supreme Court, the seventh day of March in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-fifth.

Given under my hand and the seal of the supreme court of Colorado Territory.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

Allowed by—

MOSES HALLETT,
Chief Justice of the Supreme Court of Colorado Territory,
acting as a Circuit Court of the United States on writs of
error and appeals to the Supreme Court of the United States,
under the organic act of the Territory.

83 (Indorsed:) Moritz Deitsch pl'ff in error vs. Hart, Wiggins & Co., def'ts in error. Writ of error. Filed March 7, 1871. David W. Crater, clerk supreme court Colorado Territory.

84 And the said copy of the same is in the words and figures the same as the foregoing original writ of error hereto attached, and is endorsed as follows, to wit:

Moritz Deitsch pl'ff in error vs. Hart, Wiggins & Co., def'ts in error. Copy of a writ of error lodged in pursuance of the statute of the United States in such case made and provided, for the above-named Hart, Wiggins & Co., def'ts in error. Hugh Butler, att'y for pl'ff in error. Filed March 7th, 1871. D. W. Crater, clerk."

And afterwards, to wit, on the twenty-eighth day of March, A. D., 1871, there was filed in the office of the clerk of the supreme court
85 of Colorado Territory, the following described bond and original citation with proof of service, and which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Jonas Deitsch, of Denver City, Colorado Territory, corner of & Laramie sts., merchant, and Peter Gottesleben, merchant, Laramie st., same city, are held and firmly bound unto clerk of the Supreme Court of the United States, in the sum of two hundred dollars, to be paid to the said certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we do bind ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Witness our hands and seals the seventh day of March, in the year of our
86 Lord one thousand eight hundred and seventy-one.

Whereas, at No. , July term, 1869, of the supreme court of the Territory of Colorado, between Moritz Deitsch, appellant, and Hart, Wiggins & Co., appellees, judgment was rendered against said appellant, and the said appellant having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said cause in the office of the clerk of said Supreme Court of the United States, to reverse the judgment in the aforesaid suit:

Now, the condition of the above obligation is such, that if the said obligors shall well and truly pay to the said , his executors, administrators, or assigns, all such fees as shall accrue to him, the said , as clerk as aforesaid, and charged to the
87 said Moritz Deitsch in the prosecution of the said writ of error, without any fraud or further delay, then this obligation to be void; otherwise to be and remain in full force and virtue.

JONAS DEITSCH. [SEAL.]
PETER GOTTESLEBEN. [SEAL.]

Sealed and delivered in presence of—
HENRY P. NAGEL.

Taken and approved by me at Denver, in the Territory of Colorado, this 7 day of March, A. D. 1871.

MOSES HALLETT,
C. J. Sup. Court Col. Ter'y.

(Endorsed:) Bond to the clerk of the Supreme Court of the United States for costs in the case of Moritz Deitsch, pl'ff in error, vs. Hart, Wiggins & Co., def'ts in error. Filed March 28, 1871. David W. Crater, clerk.

88 And which said certain original citation, with proof of service, is hereto attached, and is in words and figures following, to wit:

89 The United States of America to Henry B. Wiggins, David Hart, & Henry Hart, partners as Hart, Wiggins & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein Moritz Deitsch is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hono*u*rable Moses B. Hallett, chief justice of the said the supreme court of the Territory of Colorado, this seventh day of March, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] MOSES HALLETT,
C. J. Sup. Court Col. Ter'y.

90 UNITED STATES OF AMERICA,
Territory of Colorado, City of Denver, ss:

On this 28th day of March, in the year of our Lord one thousand eight hundred and seventy-one, personally appeared Hugh Butler, the attorney-in-fact of the plaintiff in error in the premises, before me, the subscriber, clerk of the supreme court of said Territory, and makes oath that he delivered a true copy of the within citation to Johnson & Teller, attorneys for the defendant in error, on the 15th day of this present month.

HUGH BUTLER.

Sworn to and subscribed before me.
[SEAL.] DAVID W. CRATER,
Clerk Supreme Court.

(Indorsed :) Moritz Deitsch vs. Hart, Wiggins & Co. Original citation, with proof of service. Filed March 28, 1871. David W. Crater, clerk.

91 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that the above and foregoing is a true and perfect transcript of all proceedings had and entered of record, and of the papers filed in said supreme court in a certain cause lately pending therein, wherein Moritz Deitsch was appellant and Henry B. Wiggins, David Hart, and Henry Hart, partners under name and style of Hart, Wiggins & Co., were appellees, and of the whole of the original. And I further certify that the writ of error and the citation, with proof of service, hereto attached, is the original writ of error and citation and proof of service that were filed in my office on the twenty-eighth day of March, in the year eighteen hundred and seventy-one.

92 In testimony whereof I have hereunto subscribed my name and affixed the seal of said supreme court, at Denver, in said Territory, this tenth day of October, A. D. 1871.

[SEAL.] DAVID W. CRATER,
Clerk of Supreme Court.

Fees for transcript: 153 folios, 20, $30.60; certificate & seal, 1.00—$31.60. Paid by plaintiff in error.

(Indorsement on cover :) No. 402. Moritz Deitsch, plaintiff in error, vs. Henry B. Wiggins, David Hart, and Henry Hart, partners as Hart, Wiggins & Co. Colorado Terr'y sup. c't. Filed 24th November, 1871.

○

Supreme Court of the United Staets.

DECEMBER TERM, 1872.

No. 167.

MORITZ DEITSCH, Plaintiff in Error,
VS.
HENRY B. WIGGINS, DANIEL NASH & HENRY NASH,
Partners as NASH, WIGGINS & CO.

IN ERROR TO THE SUPREME COURT OF THE
TERRITORY OF COLORADO.

Brief for the Plaintiff in Error.

JAMES HUGHES, OF COUNSEL FOR PLAINTIFF IN ERROR.

WASHINGTON, D. C.
W. H. MOORE, PRINTER, 511 ELEVENTH STREET.
1873.

In the Supreme Court of the United States.

December Term, 1872.

NO. 167.

MORITZ DEITSCH, Plaintiff in Error,

vs.

HENRY B. WIGGINS, DANIEL NASH and HENRY NASH, Partners as NASH, WIGGINS & CO.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

Brief for the Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action of trespass *de bonis asportatis*, brought by Henry B. Wiggins, David Nash & Henry Nash, partners under the name of Nash, Wiggins & Co., against William Z. Cozzens (sheriff,) Moritz Deitsch, the plaintiff in error, Isadore Deitsch & Jonas Deitsch, (see Declaration, pp. 3 & 4 of Record.)

Process was served on all of the defendants excepting Jonas Deitsch; as to him there was a return of "not found".—(Record, p. 3.). The defendants served with process pleaded: 1st, the general issue, and there was joinder thereon; 2nd, a special plea, alleging in substance that Cozzens, the sheriff, took the goods mentioned in the declaration by virtue of a writ of attachment sued out by his co-defendants against the firm of O. S. Buell & Co.—(Record, pp. 4 & 5.)

The plaintiff replied: 1st, by taking issue upon the right of property of Buell & Co. in the goods, on the 6th of May, 1867.—(Record, pp. 5 and 6.) Second. Upon the right of property of Buell & Co., on the 4th May, 1867.—(Record, pp. 6 and 7.) Third. They denied the issuance of the writ of attachment on the 3d May, 1867, returnable 6th July, 1867, and deny the levy of the same. On these pleadings the issues were closed.—(Record, p. 7.) There was a trial by jury and a verdict of guilty against Wm. Z. Cozzens (sheriff) and Moritz Deitsch, the plaintiff in error—damages assessed at $2,315.90.—(Record, p. 7.) It may be noted at this point that one of the defendants, Jonas Deitsch, disappears from the cause, so far as this record is concerned, and unless the entry on page 7 of the record is to be construed as an appearance in his behalf and another defendant, Isadore Deitsch, for whom there was an appearance and plea and issue joined, was dropped from the cause without a verdict for or against him.—(Record, p. 7.)

On page 8 of the record, the Court render a judgment in his favor for costs, but there does not appear to be any verdict to support the judgment. Cozzens & Moritz Deitsch, moved for a new trial, and their motion was overruled, and they each separately appealed to the Supreme Court of the Territory of Colorado.—(Record, pp. 8 and 9.) A bill of exceptions sets out the evidence, (Record, pp. 9, 15.) Another bill of exceptions, shows the rejection of sundry matters of testimony offered by the defendants, and ruled out by the Court.—(Record, pp. 15, 19.) Exceptions were also taken to certain instructions given by the Court, and certain instructions refused.—(Record, pp. 19 and 20.) The Supreme Court of the Territory affirmed the judgment of the inferior Court.—(Record, p. 22.) From the judgment of the Supreme Court of the Territory a writ of error is prosecuted in due form.—(Record pp. 24 to 27.)

ASSIGNMENT OF ERRORS.

Error. The Supreme Court of the Territory of Colorado erred in affirming the judgment of the inferior Court of said Territory, which judgment was erroneous in the following particulars:

1st. In refusing a new trial upon the evidence contained in the record; 2nd in admitting testimony improperly, and in rejecting testimony improperly, as shown by the bills of exception and specifically as follows:

In excluding testimony tending to show that the plaintiffs below closed up their business shortly after the levy, and how long they continued in business after the levy.—(Record, p. 10.)

In excluding evidence as to what was said and what occurred between Nash, one of the plaintiffs below, and Cozzens, one of the defendants below, at plaintiff's store when the goods were invoiced.—(Record, p. 10, last paragraph.)

In excluding testimony as to what was the occupation of Cozzens, (sheriff,) one of the defendants, at the time he took the goods, and the reasons he gave for taking them. (Record, p. 1.)

In overruling the offer of defendants below to prove that the goods taken were a part of the stock of the merchandise of Oliver S. Buell, who transacted business under the style of O. S. Buell & Co., and that the witness, Charles E. Sherman, was the clerk of said O. S. Buell for the space of about six months prior to the 4th day of May, 1867; that for two or three months prior to the second or 6th day of May, A. D. 1867, the said O. S. Buell was absent from the said Territory of Colorado; that during the absence of said Buell, said Sherman was the clerk of said Buell to carry on the regular business of said Buell in Central City, Gilpin county, Colorado Territory, which was retailing clothing and merchandizing; that the said Sherman had no right or authority whatever to sell or dispose of the entire stock of goods of said Buell, but was only authorized to sell in the regular course of business; that on the 29th of April, 1867, John Q. Nash, agent of the plaintiff, well knowing that said Sherman was not authorized to sell the entire stock of goods fraudulently agreed, combined and confederated with the said Sherman to make a pretended purchase of the entire stock of goods for the purpose of hindering, delaying and defrauding the defendants, Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, defendants, herein and other creditors; that the said Nash well knew that the said Jonas Deitsch, Moritz Deitsch, and Isadore Deitsch, defendants, were creditors of said Buell to a large amount, and that such sale was designed by him to cheat, hinder, and defraud said defendants; that said stock of goods was well worth the sum of $10,000, but was sold to said Nash, Wiggins & Co. for a grossly inadeqnate sum; that whatever money was paid, if any, or securities given, if any, were so cancelled, smuggled, and arranged to protect and place it beyond the reach of defendants and for the benefit of the said Buell, Nash, Wiggins & Co. and John Q. Nash and said Sherman.—(Record, p. 15.)

In excluding the evidence of the attachment proceedings against O. S. Buell & Co. (Record, pp. 15–18.)

In instructions of the Court given to the jury and the instructions refused.—(Record, pp. 19 and 20.)

POINTS AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

The points and argument are sufficiently developed in the statement of the case and the assignment of errors, and it would be but repetition to state them in a different form. The rulings of the court of original jurisdiction were clearly erroneous in admitting improper testimony, in excluding testimony that was legitimate and proper, and in its instructions to the jury given and refused.

In the narrative contained in the foregoing statement this Court will note some irregularities, but how far they can benefit this plaintiff in his present suit the undersigned pretends not to say. The matters referred to are these.—The rendition of a judgment for costs in favor of Isadore Deitsch after an issue joined without any verdict upon that issue. (Record, pp. 7 and 8.) The disappearance from the record of the proceedings of Jonas Deitsch after a return of "not found," without even a continuance or a *nol. pros.*, the sheriff's return as to him is on page 3 of the Record. These are mere matters of form, yet the forms of judicial proceedings often become matters of substance. It is, however, confidently believed that the refusal to allow the official character of the sheriff's proceedings to be proved, and the *res gestœ* at the time of the seizure in their entirety, will be conclusive of this case. Furthermore, it is insisted, that the paragraph on page 19 of the Record, from the Judge's charge in the following words, is a fatal error: "If the jury believe from the evidence that, at the time defendant, Cozzens, was packing up the goods and chattels mentioned in the declaration, Moritz Deitsch was there assisting in selecting the same, without consent of plaintiffs, then he was guilty of trespass, and if he had the consent of the said plaintiffs, it is incumbent on the defendant, Deitsch, to prove such consent."

That paragraph should have been qualified under all the circumstances of the case by words to show that assisting a sheriff in the execution of process, was no trespass.

JAMES HUGHES,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

Moritz Deitsch, Plaintiff in Error, *vs.* Henry B. Wiggins, Daniel Hart, and Henry Hart, Partners as Hart, Wiggins & Co.	No. 167.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

Brief and Argument of Defendants in Error.

STATEMENT OF CASE.

Upon June 29, 1867, defendants in error filed their declaration in the district court of Gilpin county, Colorado, alleging trespass, in that William Z. Cozzens, Moritz Deitsch, Isador Deitsch, and Jonas Deitsch, on the 4th of May, 1867, entered the store and house of defendants in error in Central City, county of Gilpin, Colorado, and took and carried away certain goods of defendants.

The usual summons had previously issued and been served upon Cozzens, Moritz Deitsch, and Isador Deitsch—Jonas Deitsch not being found. (Rec., pp. 2, 3.)

At the July term of the court Cozzens and the two Deitsches jointly plead general issue, and also filed a joint special plea. (pp, 4, 5.)

Briefly stated, this special plea alleged that the goods and chattels mentioned in the declaration were the property of O.

S. Buell & Co., on the 4th day of May, 1867; that on the 3d day of May, 1867, a writ of attachment was issued out of the district court of Gilpin county, in favor of the firm of Deitsch & Bros., directed to the sheriff of said Gilpin county, commanding him to attach so much of the personal and real estate of said Buell & Co. as should be sufficient to satisfy the sum of $1,478 97; that on the said 3d day of May, 1867, the said William Z. Cozzens was sheriff of Gilpin county; that on said day the writ of attachment was delivered to him to execute; and that on the 4th day of May, 1867, he levied upon the said goods and chattels as the property of the said Buell & Co., by virtue of said writ of attachment, which were the supposed trespasses.

On the 10th of October, 1867, the defendants in error filed a replication to the special plea above referred to, denying the allegations of said special plea; and at the May term of the court, 1868, the defendants in error filed two further replications, denying more specifically the averments of the said special plea. (pp. 6 and 7.)

On the 6th of June, 1868, the cause came on to be heard, and was tried by jury, who found Cozzens and Moritz Deitsch guilty, and assessed the damages at $2,315 90. (p. 7.) Thereupon notice for new trial was given, and was heard on the 20th of June, 1868. Motion for new trial was refused, whereupon the court entered judgment for defendants in error against William Z. Cozzens and Moritz Deitsch, who entered motion for appeal. (p. 8.)

Cozzens seems not to have prosecuted his appeal, leaving the matter with Deitsch. The evidence in the case, together with the rulings of the district court, to which exceptions were taken, are set out in the bill of exceptions. (pp. 9 to 21.)

At the February term, 1871, the supreme court of Colorado Territory having had the cause before it at a previous term, decided that there was no error in the record, proceedings or judgment of the district court below, and therefore affirmed judgment of the district court; whereupon Moritz Deitsch, plaintiff in error here, sued out his writ of error to the Supreme Court of the United States. (pp. 22 to 26.)

We shall endeavor to notice the facts and law in the following

Points.

1. Under the general issue, it was incumbent on plaintiffs in district court to prove that they were in possession of the goods and chattels described in the declaration, and that the appellant and Cozzens disturbed such possession, as alleged in declaration, and the damages sustained. This they did. (pp. 10–14.)

Smith's Leading Cases, vol. 1, Armory *v.* Delamirie, 473*, 474*, 477*.
13 Johnson Rep., Cook *v.* Howard, 283.
13 Wendell Rep., Butts *v.* Collins, 143.

2. The defendants, under the general issue, could not question the title of the plaintiffs, except by way of rebuttal, and could not offer any evidence to justify the acts complained of. Evidence in justification must be specially pleaded.

Wheaton's Selwyn, 1335, and 1380, 7th Am. ed.
Steven's *Nisi Prius*, vol. 3, ed. of 1844, 263, 264.
11 Ill. Rep., Cook *v.* Miller, 610.
12 Ill. Rep., Hahn *v.* Ritter, p. 80.
13 Ill. Rep., McDonald *v.* Wilkie, 24, 25.
11 Johnson, Demick *v.* Chapman, 132.
10 Wendell, Root *v.* Chandler, 112, 113.
3 Hale, Newbury *v.* Pon, 525.
3 Hale, Sampson *v.* Watkins, 619.
7 Cowen, Van Buskirk *v.* Young, 35.

3. The special plea is the joint plea of appellant and Cozzens, and sets out the issuing of the writ of attachment against the goods and chattels of O. S. Buell & Co., at the suit of Deitsch Brothers, and delivery to Cozzens as sheriff. That on the 4th day of May he levied on the chattels

described in the declaration, as the goods of Buell & Co. at that time.

Appellant may say that this would have been a good plea for Cozzens alone. We do not admit that. We contend that it was a bad plea for Cozzens alone; but as it is the joint plea of appellant and Cozzens, it is not worth while to point out the faults in it as the plea of Cozzens alone.

(*a*) It is defective plea in not alleging that the Deitsches were creditors of O. S. Buell & Co., against whom they had a subsisting debt.

There is no allegation of any cause for an attachment against the goods of Buell & Co.; no allegation that an affidavit had been made or bond filed, as required by law; no allegation of any fraud on the part of Buell & Co., or appellees.

(*b*) No allegation that the Deitsches did the acts complained of, under the direction of the sheriff, &c., and no attempt to justify the act on the part of any one except Cozzens, and yet it is the joint plea of appellant and Cozzens.

(*c*) As the appellant was one of the plaintiffs in the writ of attachment, it was incumbent on them to allege everything in this plea that the appellant would have been required to do if he had plead alone; but even in cases where the officer pleads alone, and attempts to overthrow a sale by the debtor on the ground of fraud, he must do something besides produce his writ, and of course it was necessary to plead it.

(*d*) The plea is also defective, because there is no allegation in it that the writ of attachment had been returned. If the return day had passed before the special plea was filed, the officer justifying under the writ should allege a return; for if he did not return it he was a trespasser, even if the goods were the property of Buell & Co.

See 4 Blackford, Givens *v.* Wilson, 330.
See cases cited 4 Blackford, 330.
24 Pickering, Wilder *v.* Holden, 12.

4. A plea bad in part is bad in all respects; and if bad for one of the defendants, is bad for both; and if it does not present a full defence to Cozzens, it does not to Deitsch; and if not to Deitsch, not to Cozzens.

3 Mass., Moore *v.* Parker, 310.
1 Howard, United States *v.* Linn, p. 104.
16 Johnson, Higby *v.* Williams, 216.
2 Bing., Hodges *v.* Chapman, 523.
2 Term R., Dilffield *v.* Scott, 377.
1 Stra., Phillips *v.* Brian, 509.
2 Stra., Smith *v.* Bouchan, 993–1184.
2 Scam., Glenson *v.* Edwards, 450.
7 Cowen R., Bradley *v.* Hunt, 330.
Wheaton's Selwyn, vol. 2, 1354.
Saunders on Pleading, vol. 2, part 2, 883.
Steven's Plead., 5 Am. ed., 407.
Chitty's Plead., vol. 1, 546, 566.
2 Cowen Rep., Wales *v.* Hart, 426.
5 Wendell Rep., Merrill *v.* Forbes, 237.
Gould's Pleading, sec. 10, chap. 6, p. 361.
Bacon's Ab., vol. 9, Trespass.

5. The appellant and his co-defendants could not complain of any transaction between O. S. Buell and plaintiffs, until they had put themselves in such a position that the court might see that they might be injured by such transaction; and in this action it is immaterial what may have been the rights of O. S. Buell & Co., unless it appears that the rights of the defendants were impaired. The contest is between plaintiffs and defendants, and the plaintiffs need not show title against the whole world.

The defendant cannot set up title in an action of trespass *de bonis* in a third party to defeat plaintiffs, and if he sets up title in a third party, he must connect himself with such title, or show authority for his acts from such party. Can that be done without averment of some kind in his place? The defendant in an action of trespass *de bonis* cannot justify the act complained of by showing property in a third party.

5 Hill Rep., Noble & Eastman *v.* Holmes, 195.
Smith's Leading Cases, Armory *v.* Delamirie, 473*, *et seq.*
16 Wendell Rep., Parker *v.* Walrod, 517.
23 Wendell Rep., Jansen *v.* Acker, 481.
13 Johnson R., Cook *v.* Howard, 283.
11 Wendell R., Duncan *v.* Spear, 57.
17 Wendell R., Hanmer *v.* Welsey, 92.
2 Pickering, Damon *v.* Bryant, 413.
6 Hill, Van Etten *v.* Hurst, 313, 314.
3 Mass. R., Moore *v.* Parker, 311, 312.
4 Blackford, Walpole *v.* Smith, 305, 306.
3 Wis. R., Eaton *v.* White, 294.
11 Ill. Rep., Cook *v.* Miller, 610.

6. In this case the appellant cannot justify under the writ of attachment alone, for it has always been held that if the sheriff is sued by a stranger to his writ on *fieri facias*, and he contests the plaintiff's title on account of fraud, he must show a right in the party suing out the writ to complain. In case of attachment he must show all the proceedings thus authorized by law, and that there was a debt due the party named as plaintiff in the writ. In case of *fieri facias* he must show a judgment on what issued. There is a wide distinction between a case where the defendant in the writ sues the sheriff and where the suit is brought by a stranger. If the officer who contests the sale on account of fraud must show this, the plaintiff in original writ must certainly do it. The cases all show there is a wide difference where the officer finds the property in the possession of a stranger or in the possession of the defendant named in the writ.

2 Pickering, Damon *v.* Bryant, 413.
5 Hill, Noble *v.* Holmes, 194.
Douglass, Ackworth *v.* Kempe, 40.
1 Lord Raymond, Lake *v.* Billers *et al.*, 733.
5 Burrows, Martyn *v.* Pouger, 2631.

3 Hill, Simpson *v.* Watrus, 620.
16 Wendell R., Parker *v.* Walden, 517.
2 Johnson, High *v.* Wilson, 47.
Wheaton's Selwyn, vol. 2, 1360.
2 Comstock, Sheldon *v.* Van Buskirk, 477.
29 Ill. Rep., Dayton *v.* Fry, 526.
19 Wendell, Morris *v.* Van Voast, 283.
19 Johnson, Mills *v.* Martin, 7.
5 Denio, Walker *v.* Mosley, 104, 105.
3 Wis. Rep., Eaton *v.* White, 297.
3 Wis. Rep., Jones *v.* Lake, 214.
Bacon's Ab., vol. 9, 518.
Stra, 509, 993, 1184.
2 Greenleaf Ev., sec. 597, (7.)

8. The special plea is pleaded as a justification, hence it admits that the goods and chattels were in the possession of plaintiffs, and that the defendant took them; for every plea of justification must admit that the defendant *prima facie* is a trespasser, but asserts something by way of justification or excuse.

1 Willsaunders, Earl of Manchester *v.* Vale, 27, 28.
1 Hill, Brown *v.* Archer, 266.
5 Peters, Simonton *v.* Winters, 148, 149.
22 Ill., McNall *v.* Vehon, 502.
Wills, Rowe *v.* Tutte, 15.
Salk., Gibbon *v.* Pepper, 637, 638.
3 Mod., Mathews *v.* Cary, 137.
3 Mod., Wytham *v.* Dutton, 160.
Bacon Ab., vol. 9, Trespass, 518.

In this case, by way of excuse, the defendants alleged the issuing of the writ, and that the goods were the goods of O. S. Buell & Co., and were taken on some writ, without any allegation of a fraudulent sale from Buell & Co. to plaintiffs, or that the appellant was or could be injured by any transaction between the plaintiff and Buell & Co., and amounts to a plea of property in a third person.

It was necessary for the appellant and his co-defendant to put on the record the defence they intended to make.

Chief Justice Spencer, in the case of Mills *v.* Martin: "Pleading is the statement of the facts which constitute the plaintiff's cause of action, or defendants ground of defence, in a logical form, and it is the formal mode of alleging in the record that which would be the support or the defence of the party in evidence."

19 Johnson R., Mills *v.* Martin, 37.

And it was necessary for the appellant not only to allege himself a creditor, but to prove it on the trial, as he must show he sustained the character he assumes. But he made no offer to prove he was creditor.

5 Denio R., Walker *v.* Moseley, 104, 105.

In the 5 Hill, Noble and Eastman *v.* Holmes, page 195, before cited—

> "When the officer attempts to overthrow a sale by the debtor on ground of fraud, he must go back of his process and show authority for issuing it. If he acts under execution, he must show judgment. If under an attachment, he must show the attachment regularly issued."

In the 2 Pickering, page 413, Damon *v.* Bryant, Chief Justice Parker says: "When the execution or writ upon which the goods are taken is against the plaintiff himself, the officer is justified by the precept itself. But when the goods taken are claimed by a person not a party to the suit, he brings trespass, and his title is contested on the ground of fraud, under the statute of 13 Eliz., 6, 5, a judgment must be shown if he justifies under an execution, or a debt if under a writ of attachment; because it is only by showing that he is a creditor that he can question the title of the vendee.

6 Hill, Van Etten *v.* Hurst, 313.
29 Ill. R., Dayton *v.* Fry, 526.
16 Wendell, Parker *v.* Walrod, 517.

9. The appellant may contend that by filing a replication

to the special plea we waived the defects in the plea so far that we could not take advantage of it on the trial, but might, if cast in the suit, have moved in arrest, &c., if the verdict had been for defendants.

The replication in the case did not cure the defects in the plea, for it did not set out what had been committed in the plea, and unless it did so the filing of replication does not waive matters of substance, but merely matters of form.

21 Wendell, White *v.* D., 29.
Steven's Pleading, (5 Am. ed.,) 146*, 147*, 150*.
9 Pickering, Steck *v.* Lyon, 64.
10 Wheaton, United States *v.* Morris, 281, 286.
1st vol. Chitty's Pleading, (10 Am. ed.,) 671, 672, 673.
14 Mass. Rep., Dumming *v.* Owen, 161, 162.
1st vol. Chitty's Pleading, (10 Am. ed.,) Chap. 10, 661, 662.
Gould's Pleadings, Chap. 10, sec. 27.

Pleas bad in substance are not cured by replication.

Com. Digest Pl. E., 37.
8 Coke, 120.
2 Salk., 529.
3 Cowen, Gould *v.* Ins. Co., 96–119.
21 Wendell R., White *v.* D., 26.
Stephen's Pleadings, 352, Tyler's edit. and note (*f.*)
Peterdorff Ab., vol. 3, 299, &c.

It is said in the 3d of Cowen's Reports, page 119: "The pleas bad in substance are not cured by replication; for a bar which wants substance cannot be aided by a replication."

10. The appellant may contend that the plaintiff ought to have demurred to the plea.

In the first volume of Chitty, page 661, it is said: "When the pleading is defective in substance, it is advisable in general to demur, because the party succeeding thereon is entitled to costs; but where the judgment is removed on a writ of error, no costs are recoverable."

On page 262 in same volume of Chitty it is said, "That if the defect is one of such a character that error would lie on the verdict, it is better not to demur. The rule is well established, that if the plea is bad in substance, and the plaintiff reply and defendant demur to replication, the court will give judgment for the plaintiff as if demurrer had been interposed to the plea. This would not be done if the filing of a replication was a waiver of defects in the plea."

The appellant may also contend that if the plea was bad, no advantage could be taken of it on the trial, and that the court should have allowed the evidence to go to the jury, and after the verdict, if against the plaintiff, the court might set it aside. It is not a rule of practice in courts to try cases by admitting evidence known by the court at the time to be improper under the pleading, and then correct such error by ordering a new trial or an arrest of judgment. In some cases the court will grant a new trial when evidence not pertinent to the issue went to the jury without objection, but not after. It is the duty of the party to object to improper evidence at the time it is offered, and in most cases, if he does not, he will not be allowed to object in the motion in arrest or new trial.

6 Wall. R., Roberts *v.* Graham, 581.
13 Johnson's R., Gelston *v.* Hoyt, 561.

In the 2d volume of Tidd's Practice, page 920, it is said: "As the plaintiff's action must have all the essentials to maintain it, so the defendant's bar must be substantially good; and if the gist of the bar is bad, it cannot be cured after verdict for defendant, and the plaintiff shall have judgment," &c.

Hilliard on Remedies for Torts, chap. 5, pp. 205, 206.
4 Pickering's R., Williams *v.* Hingham, 344.
17 Johnson's R., Bartlett *v.* Crozier, 456, 457.
3 Caine's R., Pelton *v.* Ward, 77.
Broom's Legal Maxims, 146.

TESTIMONY NOTICED.

The evidence on the part of the plaintiff was, that plaintiff was in possession of the goods, and that Cozzens and appellant took the goods out of plaintiff's possession on the 4th day of May, in the county of Gilpin. That Cozzens employed the witness Martin to make an invoice of the goods at cost prices. Witness Martin made such invoice, and showed it to Cozzens, who said it was correct. The entire footing of the invoice was $2,319 96, the amount of the verdict. Witness said if he had been buying the goods he would not have paid more than 75 per cent. of the invoiced price, and that by judicious management he thought the cost price might be made out of the goods. That the nearest way you can come to the cash value of the goods is the amount footed upon the invoice." That at the time of the taking of the goods the agent of the plaintiff protested against the taking, &c. (pp. 9–13.)

The appellant may suggest that he was not allowed to cross-examine the witness Martin as he ought, and he asks the witness "to state all that occurred and was said between Hart and Cozzens, while you (the witness) were present, at the time Cozzens went to Hart, Wiggins & Co's store to have the goods invoiced."

The appellant also asked the witness to state "all that occurred and was said in regard to the taking of the goods while you were present, and the time of invoice, of which you have spoken."

Appellant also asked, what was Cozzens' business at the time of the taking of the goods, and what excuse did Cozzens give for taking those goods. The court refused to allow the witness to answer, and appellant contends that he was not allowed to cross-examine the witness.

The testimony of Martin, as to what was said by Hart, referred to the time Cozzens went to take the goods, and nothing is said about the time of invoicing of the goods. The appellant does not ask what further Hart said, but proposes to prove what took place, and what was said by

Hart and Cozzens or either of them, and all that was done by the witness Hart, Cozzens, and others. Hart and Cozzens had no conversation. Hart protested and it does not appear that Cozzens replied at all to such protest. Now, if appellant had confined his inquiries as to what further Hart said at the time, it would have been proper cross-examination. If the witness had been inquired of as to any part of a conversation on the part of Cozzens, then the appellant would have been entitled to it all, and the appellant might have inquired what further was said at that time.

If it was not proper cross-examination, then it is not worth while to go into an inquiry whether it would have been proper in any other view of the case, as it is not offered as proper evidence except on cross-examination.

The third and fourth questions were not proper on cross-examination, and would not have been allowed if the witness had been introduced by defendants.

12. The appellant complains, he was not allowed to go into any inquiry as to the sale from Buell & Co. to plaintiff, and asked the questions whether the goods sold were all the goods Buell & Co. owned, &c. It was immaterial whether Buell & Co. sold the goods or not. What they had on hand in the store they did sell, and they delivered to plaintiff the goods in the declaration mentioned; and unless the appellant was in position by his pleas to show himself a creditor, it could make no difference to him.

The appellant offered in evidence the bond, affidavit, and writ of attachment in a case in favor of the Deitsches, and against O. S. Buell & Co. (pp. 15–17.) The court rejected the evidence offered. This was properly done, as the appellant had not properly plead, and if the court had allowed the affidavit, bond, and writ to have gone to the jury under the special plea, the jury could not have found a verdict which the court would have sustained. The return of the officer on the writ shows that he took the goods and chattels mentioned in the declaration from the plaintiff, and that he took the goods as the property of Hart, Wiggins & Co., (see writ,) and not as the property of Buell & Co.

If the special plea had been good, the appellant could not offer the affidavit, bond, and writ until he had proved that Cozzens was sheriff, which he attempted to do by proving that he acted in that capacity. If appellant had plead alone, as he might have done, the rule might have been otherwise; but as he had joined with Cozzens in the plea, he must prove whatever Cozzens would have been required to prove. The appellant claims that Cozzens could have proved that he acted as sheriff. The rule is, as to third parties, that color of right and actual discharge of the duties will answer, if the officer is the *de facto* officer; and the public, who are interested in his acts, cannot be required to know that he has been legally elected; but the reason does not exist when the officer is sued and justifies his writ. The statute of Colorado provides that the sheriff, when elected, shall receive certificate of his election; that he shall file bond, take oath, &c. (See Revised Statutes, pp. 177, 291.) The proof of his election is thus placed in the sheriff's hand, and if he has filed his bond, it is a matter fully within his knowledge, and a matter of easy proof on his part, as it must be a matter of record; and the appellant, having joined with Cozzens, cannot complain unless Cozzens could.

3 Scam., Schlinker *v.* Risley, 485.
21 Ill. R., Case *v.* Hall, 635.
9 Mass., Fowler *v.* Beebee, 231.
15 Mass., Bucknam *v.* Ruggles, 182.
1st vol. Greenleaf on Evidence, sec. 92.
24 Wendell R., The People *v.* White, 526.
23 Wendell R., Green *v.* Burke, 502, 503.
1 Denio R., The People *v.* Hopson, 579.

In the case last cited, the court say, and clearly, that an officer cannot recover fees or set up any rights of property on the ground that he is an officer *de facto*, unless he is also an officer *de jure*. Where one man attempts to exercise do-main over the personal property of another, it becomes him to see that he has an unquestionable title.

1 Denio, 576.
7 S. & Rawle, Riddle *v.* Co. of Belford, 386.
2 Rawle, Keyser *v.* McKissan, 139, 140.

In 5 Mass., Colburn v. Ellis, page 429, the defendants justified as parish assessors, and it was held that the justification had failed, because one of the defendants had failed to show that he had been sworn.

5 Mass., Colburn *v.* Ellis *et al.*, 430.

Neither could the writ with the return on it have been received. The return of an officer to his writ is received from the necessity of the case, and is evidence for him to a certain extent; but in this case it could not help him, as he admits by his return that it was the property of plaintiffs. The officer must make a return of some kind on his writ before it can be received, and here the return admits he has no defence. The evidence offered on the part of the appellant was not proper under the general issue, and could not be introduced under the special plea, and therefore it was properly ruled out.

CERTAIN INSTRUCTIONS NOTICED.

13. The appellant complains of the instruction given on the part of appellees, and says that the first instruction does not state the true rule of damages, that the appellant was entitled to have the goods valued at their wholesale prices. (p. 19.) The appellees were retail dealers in Colorado, and wholesale dealers in New York; and there is no justice in saying that the appellant might take the goods without authority, and then have them invoiced at the wholesale price: neither is it the law. In this case the jury rendered verdict on the sixth day of June, 1868, for the amount which Cozzens himself admitted was correct, and which witness Martin testified was the actual cost of the goods. The appellees were entitled to interest from the time of taking—thirteen

months; which at the legal rate amounted to about $240. Now, after the delay, expense of litigation, &c., the appellees ought to have had not only the highest price, but the interest on the same.

22 Ill., Bradley *v.* Geisleman, 498.

14. The appellant complains that the second instruction is too general. The instruction is to what the law is. (p. 19.) If appellees are possessed of certain property, and defendants take the same without consent of plaintiffs, such acts are acts of trespass. The court lays down the law in general terms; the premises and the conclusion are both general, and in another instruction the court says, if the plaintiffs were rightfully possessed, &c. The third instruction states the law which governs the jury in such a case as to damages, &c. The appellant complains that the fifth instruction assumes that Cozzens was present and packing the goods.

There can be no error in the instruction, even if it did so assume, for there is no dispute but what Cozzens did take the goods. That is proved, and no effort is made by the appellant or Cozzens to contradict it. The special plea of Cozzens admits it, and the jury were bound to find that he did take the goods without the instruction; and the assumption by the court that a fact is proved is not error, unless the jury might have found difficulty, and thus the court deprives the jury of their right to pass on the facts. The court has power to instruct the jury that the plaintiff has not made out a case, or that the defendant has not made out a case of justification, &c.

15. The appellant also says, that if the instructions were good law, then Martin, Ewbanks, and others, who helped invoice the goods at the request and under direction of Cozzens, were trespassers also. (p. 9.) We do not see how that can affect this case. They were undoubtedly guilty, if they acted under the direction of Cozzens, as it appears by Martin's testimony.

23 Wendell's R., Green *v.* Burke, 505.

The first instruction offered by and for the defendants was given, and correctly states what the plaintiffs must prove to obtain a verdict. (p. 19.)

The second instruction is, unless the jury believe from the evidence that defendant, Moritz Deitsch, was present, and in some way aiding, counseling, and abetting the taking of the goods in question, they will find Moritz Deitsch not guilty. (p. 20.)

It appears by the evidence that Deitsch was present at the time the goods were selected and packed; that he assisted in so doing. It does not appear that he was present at the time the goods were taken from the store of Hart, Wiggins & Co., and the instruction was calculated to mislead the jury, by not being sufficiently definite in distinguishing between taking, in legal sense, complete by the interference of Cozzens and Deitsch, and by invoicing and packing; but the taking might have been understood by the jury to be the taking out of the store. The jury also were required by instruction to believe that Deitsch had counselled and abetted the taking. Now, if he counselled, he was guilty, or if he assisted or abetted. The evidence is positive and uncontradicted, that he, Deitsch, was present, selecting goods, &c. If the jury had received this instruction, they could not have legally discharged Deitsch, so Deitsch could not have been injured by the refusal of the court to give the instruction; and if he was not, he cannot complain.

The court was asked to instruct the jury, that if they believe from the evidence that Deitsch was present at the time of taking, &c., but that neither counselled nor took part in the taking, they will find for defendant Deitsch. (p. 20.) Now, this instruction was properly refused, because it left it uncertain whether it referred to the time of the issuing or the time the goods were taken, and it was in no way supported by the evidence, and ought not to have been given, and, if given, could not have aided Deitsch; and therefore the refusal to give it could not have injured him.

The appellant hopes to make out his case as if the pleadings on the part of appellants were of such a character that they could make a complete justification against what must be admitted was *prima facie* a trespass.

The goods were in the possession of the appellees, and had been for sometime prior to the time of the taking. The appellant never had possession, nor claimed any right of possession to the goods; Cozzens never had any possession, and did not claim to have any right to the goods.

All the authorities are, that the possession of the appellees was sufficient to maintain the suit on their part, and the appellant and Cozzens could not question the right, until they had laid the foundation as creditors, &c.; and as under the pleading they could not do that, it follows that if the jury had given judgment for the appellant and Cozzens, the court would have set it aside, unless it could have been supported under the general issue.

It will hardly be contended, that the verdict was contrary to the evidence in the case; and if the special plea already noticed was not a good bar, then the appellant cannot complain.

Whether we are correct or not, as to the rules of evidence in the case, the judgment ought to be affirmed on the whole case.

These suggestions are made in absence of brief by appellant, but it is thought they will sufficiently enlighten the court upon the points to lead to a proper decision.

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CHIPMAN & HOSMER,
Of Counsel.

NOTE.—We ask to file with this argument the manuscript opinion of Bedford, J., in the supreme court of Colorado. It is a clear, terse, and, we think, accurate statement of the law and facts in the case. We hope it will be examined by the court.
CHIPMAN & HOSMER.